

Edgewater Health Care, Inc. and Local 50, Service Employees International Union, AFL-CIO, CLC. Case 14-CA-21185

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

Upon a charge filed by the Union January 3, 1991, the General Counsel of the National Labor Relations Board issued a complaint January 24, 1991, against Edgewater Health Care, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent filed timely answers to the complaint admitting in part and denying in part the allegations of the complaint.

On June 7, 1991, the General Counsel filed a Motion for Summary Judgment. On June 12, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its third amended answer to the complaint, the Respondent denied the conclusion that it had committed an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act. The Respondent, however, admitted the complaint's factual allegations including that it has not paid the contractually required contributions to the Union health and welfare fund.

The Respondent contends that its actions do not constitute a violation of the Act because at times it has been financially unable to make the contributions to the Union health and welfare fund. It is well established, however, that financial inability to pay is not an adequate defense to an ongoing failure to make contractually required fund payments. See *Air Convey Industries*, 292 NLRB 25 (1988).¹ The Respondent's claim, therefore, is without merit and provides no defense to its admitted actions.

Accordingly, in the absence of good cause being shown, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

¹ In Member Oviatt's view there may be limited circumstances, not present here, in which an employer's inability to make contractually required payments to union benefit funds may be a defense to an allegation that it unilaterally and unlawfully withheld the payments. See his dissent in *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991).

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the operation of a nursing home at its facility in Saint Louis, Missouri, where it annually derives gross revenues in excess of \$100,000, and where it annually purchases and receives products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Missouri. We find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All service employees employed by Respondent at its 5500 South Broadway, Saint Louis, Missouri facility, excluding office clerical and professional employees, registered nurses, licensed practical nurses, maintenance employees, guards, and supervisors as defined in the Act.

On July 5, 1983, the Union was certified as the exclusive collective-bargaining representative of the unit. The Respondent and the Union have been party to successive collective-bargaining agreements, the most recent of which was effective from April 1, 1990, through March 31, 1991. By virtue of Section 9(a) of the Act, the Union is the exclusive representative of the unit employees for the purposes of collective bargaining concerning rates of pay, wages, hours of employment, and other terms and conditions of employment.

The most recent collective-bargaining agreement requires the Respondent to make contributions to the Union health and welfare fund. This term of the collective-bargaining agreement is a mandatory subject of bargaining. Since August 1, 1990, the Respondent has failed and refused to make the contractually required payments to the fund, without having notified or afforded the Union an opportunity to bargain about these acts and without the Union's consent. By these acts and conduct, the Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

CONCLUSION OF LAW

By failing and refusing to make contractually required payments to the Union health and welfare fund, without having notified or afforded the Union an opportunity to bargain about such acts and without the

Union's consent, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make whole its unit employees by abiding by the Union fund provision of the collective-bargaining agreement and making all contributions that have not been paid and that would have been paid in the absence of the Respondent's unlawful discontinuance of the payments, with any other sums applicable to the payments to be computed in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). We shall also order the Respondent to make the unit employees whole for any losses they may have suffered as a result of its failure to make the contractually required fund contributions, *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf'd. 661 F.2d 940 (9th Cir. 1981), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Edgewater Health Care, Inc., Saint Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 50, Service Employees International Union, AFL-CIO, CLC, by failing and refusing to make contractually required payments to the Union health and welfare fund, without having notified or afforded the Union an opportunity to bargain about such acts and without the Union's consent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole its unit employees by abiding by the Union fund provision of the collective-bargaining agreement and making all contributions that have not been paid and that would have been paid absent the Respondent's unlawful discontinuance of payments, and by reimbursing unit employees for any expenses ensuing from the Respondent's failure to make such required payments, in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all

payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(c) Post at its facility in Saint Louis, Missouri, the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 50, Service Employees International Union, AFL-CIO, CLC, by failing and refusing to make contractually required payments to the Union health and welfare fund, without having notified or afforded the Union an opportunity to bargain about such acts and without the Union's consent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole our unit employees by abiding by the Union fund provision of the collective-bargaining agreement and making all contributions that have not been paid and that would have been paid absent our unlawful discontinuance of payments, and by reimbursing unit employees for any expenses ensuing from our failure to make such required payments, with interest.

EDGEWATER HEALTH CARE, INC.

²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."